No. 359. 1901
Motion to advance

Office Supreme Court U. S.
FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 19, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 359.

FRANCIS WINSLOW ET AL., TRUSTEES,
APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD,
APPELLEE.

MOTION TO ADVANCE.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 359.

FRANCIS WINSLOW ET AL., TRUSTEES,
APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD,
APPELLEE.

Come now the appellants, Francis Winslow, Augustus Jay and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, by their counsel, William G. Johnson, and move this Honorable Court, to advance this cause for argument to a day during the present term of the court sufficiently early to admit of its disposition by the court before the adjournment of this term, for the reasons set forth below.

WILLIAM G. JOHNSON,
Counsel for Appellants.

The ground upon which the advancement of this case is sought is that the decree appealed from is one of peculiar and unusual hardship, irremediable by reversal unless speedily had.

STATEMENT OF MATTER INVOLVED WITH REASONS FOR APPLICATION.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., pp. 83, 84), perpetually enjoining the appellants from prosecuting proceedings at law for possession of the property in controversy and from prosecuting other proceedings at law for the recovery of money damages for the alleged wrongful use and occupation of said property.

This is a proceeding in equity brought by the appellee, the Baltimore and Ohio Railroad Company, against the appellants, Francis Winslow, Augustus Jay, and The American Security and Trust Company, in their character as substituted trustees under the will of Catherine Pearson, deceased.

The primary object of the bill is to compel specific performance, by the trustees under the will, of an alleged contract for the sale and conveyance, to the appellee, of a part of the trust estate (lots 9, 10, 11 and 12 in square 710), as appears by the averments of the bill, particularly the third paragraph (Rec., p. 2), and by the second prayer for relief (Rec., p. 6). Incidentally and as appropriate to the main relief sought, the bill seeks to enjoin the appellants from prosecuting a proceeding at law for possession of the property in controversy and also another proceeding at law for compensation for its use (Prayers 3 and 4; Rec., pp. 6–7).

By the will of Catherine Pearson (Rec., pp. 26–29), after several pecuniary bequests not material to be noticed, the testatrix devised all the residue of her estate, both real and personal, to Carlile P. Patterson, William H. Philip and Walter S. Cox, to be held by them for the sole and separate use of the daughter of the testatrix, Eliza W. Patterson, during her life, with certain active trusts to be performed by the trustees, and, after the death of said Eliza W. Patterson, in trust to hold the same for the use and benefit of

the children of said Eliza W. Patterson, or the issue of any children who may have died in the lifetime of the said Eliza. In the event of the death of Eliza W. Patterson, leaving no issue or descendants of any issue, the trustees were then to hold in trust for the right heirs of the testatrix. Provision is also made for the substitution of other persons for the trustees named in the will, in the event of their death, disability, or refusal to act, so that the number of trustees might be kept up to three during the continuance of the trust.

Neither Mrs. Patterson nor any one of her children, the beneficiaries under the will, all of whom are alive, is made a party to the proceedings or has been heard therein.

The pertinent provisions of the will are as follows:

The property is devised to the trustees—

> "to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life" (Rec., p. 27).

The trustees are—

> "to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use . . . and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so" (Rec., p. 27).
>
> . . . . . .
>
> "and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only" (Rec., p. 27).

On the 1st of August, 1872, the original trustees named in the will and the Baltimore and Ohio Railroad Company entered into a lease for the premises in controversy (Rec., pp. 7 and 8). The term demised by said lease was "the full term of five years from the first day of August instant" (Rec., p. 7). The lease also contained a privilege to the railroad company to purchase said land—

> "at any time during the term aforesaid, on payment to them by said party of the second part of the sum twelve thousand five hundred and ninety-two dollars" (Rec., pp. 7 and 8).

The said lease also contained an agreement to renew in the words following:

> "That at or before the expiration of the term aforesaid, on the request of said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed, with a perfect title in fee-simple thereto" (Rec., p. 8).

The said lease was not signed by Eliza W. Patterson.

Subsequently and on the 1st of February, 1883, another lease in the same terms was executed by the then trustees, Walter S. Cox, Augustus Jay and Francis Winslow, and signed by Eliza W. Patterson; but her signature was not attested by any subscribing witness, nor was the lease executed by the railroad company (Rec., pp. 8 and 9).

On the 30th of January, 1888, the said trustees, Cox, Winslow and Jay, and the appellant, by its president, executed another lease of the said premises for the period of five years from the 1st of August, 1887, containing the same conditions and covenants expressed in the first and second leases, heretofore referred to. This lease was not signed by Mrs. Patterson (Rec., pp. 24 and 25).

On the 13th of June, 1892, by regular proceedings in the Supreme Court of the District of Columbia, Walter S. Cox was, by decree of that court, relieved from the office of trustee (Rec., p. 30), but no one was substituted in his stead.

On the 17th of October, 1892, the trustee, Winslow, signed a lease drawn in the names of Cox, Winslow and Jay, as trustees, containing the same provisions and covenants as those hereinbefore mentioned, for the term of five years from the 1st day of August, 1892 (Rec., pp. 9 and 10). This lease was not signed nor in any way concurred in by the other trustee, Jay, nor by Mrs. Patterson, nor was it executed by the railroad company. This latter lease is the last agreement signed by any of the parties relating to the possession or sale of the said property.

The property in controversy contains 41,975 square feet (Rec., p. 52). The purchase price fixed in the lease of 1872 and continued in the several subsequent leases is $12,592 or thirty cents per foot. The complainant's own evidence, the only testimony in the cause, shows the value of the property to be from sixty-five to seventy-five cents per square foot (Rec., p. 45), or from $27,287.75 to $31,481.25 for the whole.

Thus, the complainant asks a court of equity to compel the trustees to convey to it the estate of their *cestui que trust* at from $14,691.75 to $18,889.25 less than its value.

The same gross inequity applies to the rental fixed in the lease.

By the testimony of complainant's witness, the fair rental value is 5 per centum on the value of the property (Rec., p. 48), which would be, according to complainants' own proof, from $1,364.18 to $1,574.06 per annum, or from $608.63 to $818.51 per annum more than the rental in the lease.

In addition to this gross inequity in the alleged contract there is an utter lack of mutuality. At no time from 1872

to the filing of this bill could the complainant have been compelled either to renew the lease or purchase the property at the sum stipulated or at any sum.

The provisions for sale and renewal are wholly at the option of the railroad company, and this optional character is shown and distinctly availed of by the declination of the company to purchase contained in the letter of its agent of February [error for January] 28, 1899, in which he says (Rec., p. 56):

> "Our counsel advises me that *we have the right to tender the money and demand a deed*, but as I *do not have an appropriation for this particular purchase we prefer to arrange a lease.*"

And again, in the letter of February 18, 1899, he says (Rec., p. 12):

> "The present status of the company *makes it a little troublesome to purchase property at this time*, and therefore we would prefer a proposition to lease."

To the first letter above quoted from, after suggesting the lease instead of purchase, is added this statement (Rec., p. 56):

> "This will tide us over until *after the reorganization*, when we *will be in better shape to arrange for the purchase* of the lot, *if it is found to be necessary for our purposes.*"

The Supreme Court of the District granted a preliminary injunction (Rec., pp. 13–14), which was continued until the final hearing (Rec., p. 32); when it was dissolved and the bill dismissed (Rec., p. 73), the court being—

> "unable to find any substantial ground from the evidence in this case on which a decree for complainant could be based" (Rec., p. 72).

By the opinion of the Court of Appeals, reversing the decree of the Supreme Court (Rec., pp. 74–83), the appellee

is held to be entitled to a renewal of the lease of 1892 (Rec., pp. 9–10), drawn in the names of all the trustees, but signed by Winslow alone, and to possession thereunder until August 1, 1902, and thereafter to continue in possession for such indefinite and indeterminate period as the appellee "shall require the use and occupation of said land" (Rec., p. 83), thus placing the continued possession of the property entirely at the option of the railroad, which may continue or terminate the possession at its pleasure—a lease at the will of the lessee alone—the compensation therefor being left to subsequent proceedings to be begun by the Railroad Company, the appellants being in the interim enjoined from proceeding, by ordinary legal process, either to recover possession or compensation for the use and occupation.

No bond to protect appellants from damage resulting from the wrongful suing out of the injunction was given, the forty-second equity rule of the Supreme Court of the District excepting from such requirement cases restraining proceedings at law.

Thus it is seen that the appellants are wholly without protection from loss or injury pending these proceedings, and that unless an early decision shall be rendered on this appeal a reversal of the decree may fail of remedial results.

If the cause be not advanced for hearing at this term, the appellee will be enabled to enjoy possession of the property up to August, 1902, before any judgment of reversal can be rendered, and as to that part of the decree below a judgment of reversal by this court would be barren of results.

As the continuing possession accorded the appellee after August 1, 1902, is indefinite and to extend only during the pleasure of the appellee, the appellee may satisfy its pleasure in that regard before disposition of this case by this court or before the proceedings for possession, now enjoined, can be prosecuted to effect, thus leaving all the advantage

of the right of the parties to possession dependent upon one of them.

It is respectfully submitted that the peculiar hardship to the beneficiaries of this estate, resulting from the anomalous position in which the court below has placed them, warrants the trustees in seeking and justifies this court in granting an early hearing of this appeal.

WM. G. JOHNSON,
Counsel for Appellants.

Please take notice that the foregoing application will be submitted to the court on Monday, October 14, 1901, at noon, or so soon thereafter as counsel can be heard.

WM. G. JOHNSON,
Counsel for Appellants.

Service of copy of above application and notice acknowledged this fifth day of October, 1901.

GEORGE E. HAMILTON,
Counsel for Appellee.